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In the Supreme Court

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OF THE
United States

OCTOBER TERM, 1946

No. 637

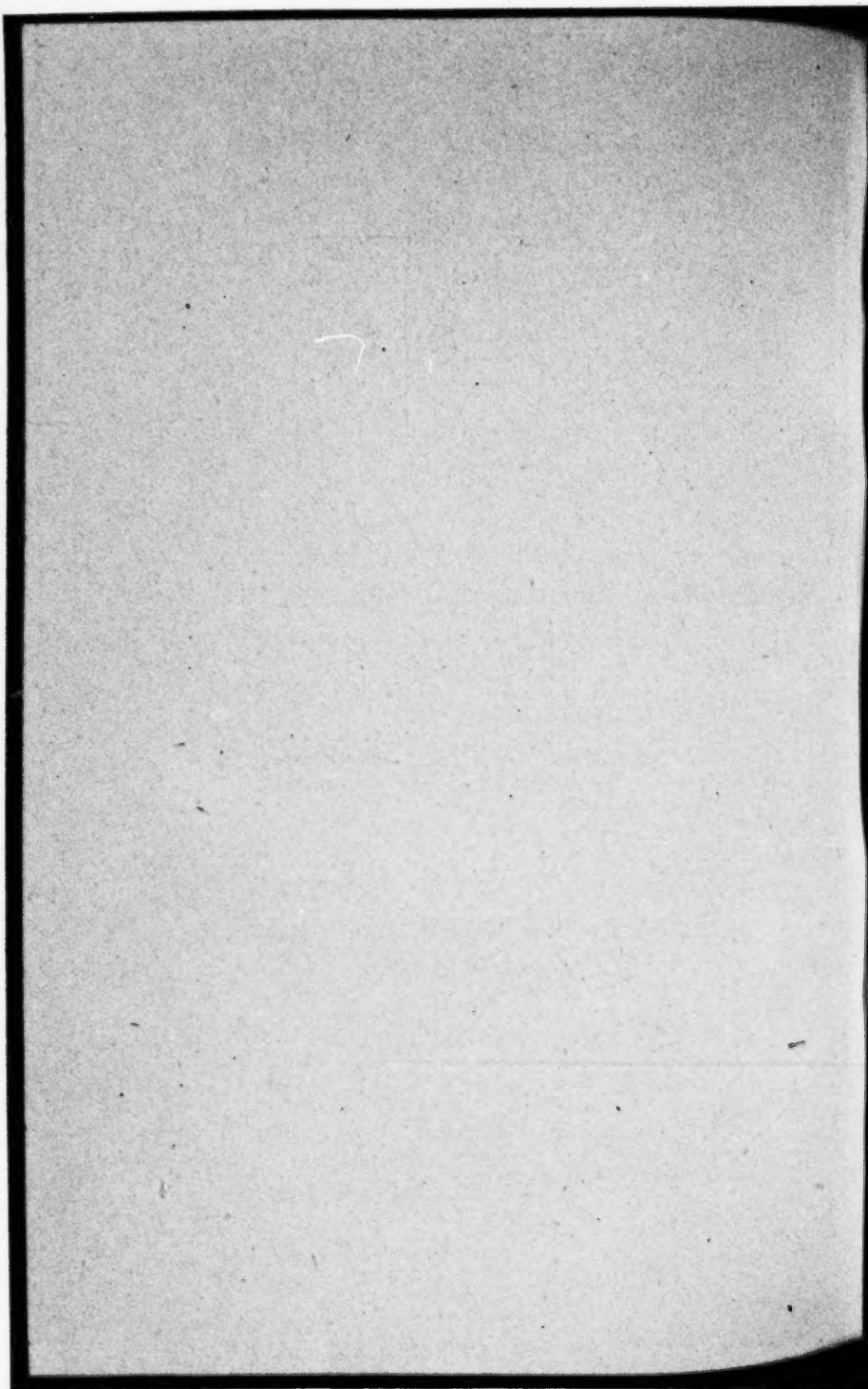
JAMES A. JOHNSON, Warden, United
States Penitentiary, Alcatraz, California,
Appellant and Cross-Appellee,
vs.

WALTER McDONALD,
Appellee and Cross-Appellant.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

X
WALTER McDONALD,

Box No. P.M.B. 602, Alcatraz, California,
Petitioner, Pro Se.



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In the Supreme Court

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OCTOBER TERM, 1946

No.

JAMES A. JOHNSTON, Warden, United
States Penitentiary, Alcatraz, California,
Appellant and Cross-Appellee,
vs.

WALTER McDONALD,
Appellee and Cross-Appellant.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

*To the Honorable Fred M. Vinson, Chief Justice of
the United States, and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

Petitioner Walter McDonald, appellee and cross-appellant, respectfully prays that a writ of certiorari

issue to the United States Circuit Court of Appeals for the Ninth Circuit to review an order of that Court entered on August 30, 1946.

OPINIONS BELOW.

The opinion of the United States District Court is recorded in 62 Federal Supplement 830. (R. 73.) The opinion of the Ninth Circuit Court of Appeals is reported in Fed. (2d) and R. 144.

JURISDICTIONAL STATEMENT.

This is a petition for writ of certiorari by cross-appellant and appellee below to review an order of the Ninth Circuit Court of Appeals filed on August 30, 1946, reversing a judgment of the District Court (R. 73) granting a petition for a writ of habeas corpus and remanding cross-appellant herein to the U. S. Marshal to be returned to the U. S. District Court for the Eastern District of Michigan for further proceedings upon a 1938 indictment charging him with a felony.

The appeal below was consolidated with the cross-appeal of the appellee taken on October 24, 1945 (R. 86), from said order and from the minute order of the District Court denying his motion to amend said order.

The pleadings necessary to show the existence of the jurisdictions are the petition for the writ (R. 2),

the order to show cause (R. 68), the return to the order to show cause (R. 69), the traverse to the return to the order to show cause (R. 70), memorandum and order denying motion to dismiss the petition and remanding petitioner to Michigan (R. 73), the motion to amend the remanding order (R. 80), the order denying the motion to amend the remanding order (R. 84), the appellant's notice of appeal (R. 78), the cross-appellant's notice of cross-appeal (R. 86), and the order of the Ninth Circuit Court of Appeals reversing the judgment of the District Court. (R. 144, 148.)

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code as amended. 28 U.S.C.A., Section 347(a). The date of the order which petitioner seeks to have reviewed is August 30, 1946.

STATEMENT OF THE CASE.

Walter McDonald, appellee and cross-appellant below, was indicted jointly with one Barnowski, on May 4, 1938, in the U. S. District Court in Michigan. (R. 99.) On June 10, 1938, he was arraigned, without counsel, and entered a not guilty plea to the indictment which charged him with the commission of bank robbery. On January 25, 1939, the defendants were tried by jury and found guilty. (R. 106.) On the following day McDonald was sentenced to 35 years imprisonment. He has been in prison ever since, presently being incarcerated in the federal penitentiary at Alcatraz, California, where he is restrained of his liberty by the respondent as the warden of said prison.

He filed a petition for a writ of habeas corpus in the District Court (R. 2) alleging the restraint to be illegal because the judgment of conviction out of which it arose was void because he was deprived of his right to the assistance of counsel in the trial proceeding. An order to show cause issued on the petition. (R. 68.)

The respondent's return to the order to show cause (R. 69) admits all the facts alleged in the petition but prayed a denial thereof because a prior application for a writ (R. 125) made by the petitioner in proceeding No. 23414* had been denied by the District Court. The petitioner filed a traverse thereto. (R. 70.) Consequently, the only defense to the application is that tendered by the return to the order to show cause and this is limited to a question whether the issue raised by the petition is foreclosed because proceeding No. 23414 had been resolved against him.

Thereafter the District Court, by a memorandum opinion (R. 73), refused to dismiss the petition and made a finding that the petitioner had been deprived of his constitutional right to the assistance of counsel in the Michigan trial proceeding and ordered him remanded to the custody of the U. S. Marshal to be returned to the Michigan District Court for further proceedings on the indictment.

The respondent appealed. (R. 78.) Thereafter, the petitioner moved the District Court to amend the find-

*The petition in No. 23,414 (R. 89) tendered issues different from the instant one. It attacked the validity of a sentence for duplicity. It was denied (R. 126) and the denial was affirmed on appeal in *McDonald v. Johnston*, 149 Fed. (2d) 768.

ings and judgment under Rule 52 R.C.P. so as to provide for the discharge of petitioner. (R. 80.) This motion was denied for want of jurisdiction in that Court to pass upon the merits of the motion occasioned by the filing of respondent's notice of appeal. (R. 84.) Thereafter the petitioner cross-appealed from the said remanding order and from the minute order denying his motion to amend it. (R. 86.) Thereafter, he moved the Ninth Circuit Court of Appeals to dismiss the appeal upon the ground that it had been taken from an interlocutory order, and said Court denied the motion. (R. 137, 139.)

QUESTIONS PRESENTED.

1. Did the Ninth Circuit Court of Appeals have lawful jurisdiction to review an interlocutory order of the U. S. District Court?
2. Does the petition for the writ of habeas corpus present sufficient grounds to constitute a cause of action?
3. Can a U. S. District Court upon granting a petition for writ of habeas corpus remand a petitioner to the original trial Court for further proceedings when it has found as a matter of law that the *judgment of conviction*, verdict and sentence are void for want of jurisdiction in said original trial Court?

SPECIFICATION OF ERRORS.

1. The Ninth Circuit Court of Appeals erred in holding that it had lawful jurisdiction to review an interlocutory order of the U. S. District Court.

2. The Ninth Circuit Court of Appeals erred in holding that the record showed that there was no denial of the assistance of counsel which finding is not supported by the undisputed facts.

3. The U. S. District Court below erred in remanding petitioner to the original trial Court for further proceedings in the case.

REASONS RELIED ON FOR GRANTING THE WRIT.

(1) The District Court below resolved the issues in favor of petitioner. It did not require the appearance of the petitioner in Court to testify in support of the allegations of fact. Apparently the District Court, under 28 U.S.C.A., Section 458, and the rule established in *Walker v. Johnston*, 312 U. S. 275, 284, considered his appearance and testimony unnecessary because the facts were not in dispute; were admitted by the traverse to the return to the order to show cause and, in light of the facts, could not have been disputed.

(2) It is axiomatic that the findings of the District Court, if supported by substantial evidence, are binding on appeal. Rule 52(a), *Federal Rules of Civil Procedure*.

(3) Since the sworn averments of petitioner were not in dispute the order of the Circuit Court of Appeals reversing the District Court is in direct conflict with pertinent decisions of this Court. *Johnson v. Zerbst*, 304 U. S. 458; *Glasser v. United States*, 315 U. S. 60; *Powell v. Alabama*, 287 U. S. 45.

(4) The Circuit Court's judgment of reversal is void because that Court lacked jurisdiction to entertain an appeal from a mere *interlocutory* order of the District Court below. In assuming jurisdiction it did so in violation of the provisions of 28 U.S.C.A., Section 463(a) and in direct conflict with an applicable decision of the Supreme Court, to-wit, *Collins v. Miller*, 252 U. S. 364 at 368-369.

(5) A U. S. District Court does not have warrant of law to grant a petitioner for a writ of habeas corpus, a new trial, release him on the writ of habeas corpus, and remand him to the original trial Court for such unauthorized new trial. *McNally v. Hill*, 293 U.S. 131; *Harlan v. McGourin*, 218 U. S. 442; *United States v. Mayer*, 235 U. S. 55.

(6) This Honorable Court should grant certiorari to correct these procedural and jurisdictional errors for the future guidance of the Federal Courts.

PRAYER.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Ninth Circuit to the end that the cause

may be reviewed and determined by this Court; that the order of the said Circuit Court be vacated; that the minute order of the District Court be amended to "order the discharge of petitioner"; that the minute order of the said District Court be affirmed as amended; and that petitioner be granted such other, further or different relief as to this Court may seem proper.

Dated, Alcatraz, California,
October 14, 1946.

WALTER McDONALD,
Petitioner, Pro Se.

CERTIFICATE

The foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, Alcatraz, California,
October 14, 1946.

WALTER McDONALD,
Petitioner, Pro Se.

In the Supreme Court

**OF THE
United States**

OCTOBER TERM, 1946

No.

**JAMES A. JOHNSTON, Warden, United
States Penitentiary, Alcatraz, California,
Appellant and Cross-Appellee,
vs.**

**WALTER McDONALD,
*Appellee and Cross-Appellant.***

**BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.**

OPINIONS BELOW.

Stated in the petition. (p. 2.)

JURISDICTION.

Stated in the petition. (p. 2.)

STATEMENT OF CASE.

The accompanying petition contains a statement of the material facts as well as a statement of the questions involved. (p. 3.)

SUMMARY OF ARGUMENT.

The order of reversal of the Circuit Court is void because said Court lacked jurisdiction to review an interlocutory order in a habeas corpus proceeding.

It is axiomatic that the findings of a District Court, if supported by substantial evidence, are binding on appeal.

A United States District Court has no authority in law to grant a petitioner for a writ of habeas corpus a new trial and to transport said petitioner to the original trial Court for such unauthorized purpose. It may only remand or discharge petitioner.

POINT ONE.

THE NINTH CIRCUIT COURT ERRED IN HOLDING THAT IT HAD LAWFUL JURISDICTION TO REVIEW AN INTERLOCUTORY ORDER IN A HABEAS CORPUS PROCEEDING.

1. A final order of a District Court in habeas corpus proceedings is a condition precedent requiring satisfaction to support an appeal under Title 28 U.S.C.A. Section 463(a) reading as follows:

“In a proceeding in habeas corpus in a District Court, or before a District Judge or a Cir-

cuit Judge, the FINAL ORDER shall be subject to review, on appeal, by the Circuit Court of Appeals of the circuit wherein the proceeding is had."

2. An order entered in habeas corpus proceedings remanding a prisoner to another jurisdiction for further proceedings to be had upon an indictment out of which his commitment arises does not constitute a "final order" from which an appeal lies. *Collins v. Miller*, 252 U. S. 364 at 368-369.

POINT TWO.

THE NINTH CIRCUIT COURT ERRED IN HOLDING THAT THE RECORD SHOWED THERE WAS NO DENIAL OF THE ASSISTANCE OF COUNSEL; WHICH FINDING IS NOT SUPPORTED BY THE UNDISPUTED FACTS.

On September 7, 1938, more than five months after petitioner's arrest he directed a letter to the trial judge informing him of his need for counsel and of his financial incapacity to employ counsel. (R. 22.) This letter was ignored. (R. 17.)

The Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel. *Johnson v. Zerbst*, 304 U. S. 458.

On January 23, 1939, petitioner was notified by the Court that he would be tried the next day. Attorney George Fitzgerald called to see petitioner on the evening of January 23, 1939. He had been sent by a friend that day to see if he could make arrangements to defend petitioner. (R. 51.)

During the consultation Attorney Curran entered and announced that he was defense counsel. At that time petitioner thought that Attorney Curran had been appointed by the trial Court. Petitioner requested him to withdraw from the case. He refused. (R. 51.) Whereupon Attorney Fitzgerald withdrew from the case and departed.

When the trial began the following day Attorney Curran moved the Court for a continuance so he could prepare a defense. (R. 52.) The motion was denied. Petitioner then arose and publicly, in open Court, requested the judge to appoint other counsel adding: that Attorney Curran was awaiting trial before the Michigan Bar upon a complaint made against him by the petitioner (R. 43, 50); and that because of these radically opposed interests Attorney Curran, as defense counsel, was prejudicial, hostile and, therefore, disqualified. This request the Court denied. (R. 9, 40, 59.)

Thus petitioner was forced to trial with an attorney whose best interests made petitioner's conviction and removal from the state imperative, so that he could not be present to appear as a witness before the Michigan Bar on March 10, 1939, against Attorney Curran.

And that is exactly what happened. On March 3, 1939, petitioner was committed to the U. S. Penitentiary at Leavenworth, Kansas. On March 10, 1939, the Michigan Bar dismissed the charge against attorney Curran for lack of evidence. (R. 30.)

Powell v. Alabama, 287 U. S. 45:

"In any event the circumstances lend emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, defendants did not have the aid of counsel in *any real sense*, although they were as much entitled to such aid during that period as at the trial itself."

* * * * *

"Under the circumstances disclosed, we hold that defendants were *not accorded the right of counsel* in any substantial sense. To decide otherwise, would simply be to ignore actualities."

Thomas v. Dist. of Columbia, 90 F. (2d) 424:

"And the Sixth Amendment, guaranteeing the accused in a criminal prosecution the assistance of counsel for his defense, means *effective assistance*."

Glasser v. United States, 315 U. S. 60:

"To determine the precise degree of prejudice sustained * * * is at once difficult and *unnecessary*. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Thus petitioner was precipitated into a pseudo trial wherein a lawyer was present. But said lawyer did not lend assistance to the defense. Such action was

diametrically opposed to his vital interests. And he could not assist defendant if he would. For he had made absolutely no preparation for a defense. (R. 52.)

When the trial judge denied the verbal application of petitioner, in open court, for qualified counsel who would defend him he was deprived of the protection of the Sixth Amendment.

The opinion of the Ninth Circuit Court evidently proceeded upon the assumption that the reputation of a sister Circuit Court for infallibility in decision was of more importance than the protection of petitioner's fundamental constitutional right to counsel.

We have been taught to believe that appellate tribunals existed for the purpose of safeguarding the constitutional rights and liberties of individuals. The opinion of the Circuit Court challenges our faith in that belief.

The Circuit Court opinion, page 3 (R. 146), states that the depositions attached as exhibits to the petition showed there was no denial of counsel and that, in consequence, the petitioner was not entitled to the writ. To draw such a conclusion that Court ignored the uncontradicted allegations of the petition (R. 3-4) and the uncontradicted recitals of the depositions incorporated therein demonstrating the deprivation of counsel. See statement of the trial judge, Judge Moinet (R. 9); the statement of Attorney Curran (R. 40); and the statement of Chief Assistant U. S. Attorney Babcock. (R. 59.)

In addition thereto, attention is drawn to the fact that the Tenth Circuit Court of Appeals, in two prior

habeas corpus proceedings brought by the petitioner, sets forth in its opinions facts demonstrating petitioner was denied assistance of counsel but drew the erroneous conclusion of law that the denial did not violate the constitutional guaranty. (See *McDonald v. Hudspeth*, 113 Fed. (2d) 984, and *McDonald v. Hudspeth*, 129 Fed. (2d) 196.) The District Court below was informed of these two prior denials of the writ and took judicial cognizance of the opinions of the Tenth Circuit Court under the rule established in *Wells v. United States*, 318 U. S. 257-260.

Inasmuch as a prior denial of an award of the writ does not bar a subsequent one the doctrine of *res judicata* has no application in habeas corpus proceedings. *Waley v. Johnston*, 316 U. S. 101. Under the rule announced in *Loisel v. Salinger*, 265 U. S. 134, a district judge is authorized to exercise his discretion in considering and giving controlling weight to prior refusals of a court to discharge a person in habeas corpus proceedings.

The District Court below was informed of the denials of petitioner's prior petitions but, in the exercise of the discretion lodged in it, refused to give controlling weight to those denials because factually and as a matter of law the denials were erroneous. The Ninth Circuit Court of Appeals, although not empowered to interfere with the discretionary power lodged in the district below, in reversing the District Court below, did so in violation of the rule laid down in *Hudson v. Parker*, 156 U. S. 277; *In re Parsons*, 150 U. S. 150; and *Ex parte Brown*, 116 U. S. 401.

POINT THREE.

THE U. S. DISTRICT COURT BELOW ERRED IN REMANDING PETITIONER TO THE ORIGINAL TRIAL COURT FOR FURTHER PROCEEDINGS IN THE CASE.

Where an accused person is deprived of his substantive constitutional right to counsel the trial Court loses jurisdiction over the cause at the time of the deprivation and a judgment of conviction subsequently entered therein is void. *Johnson v. Zerbst*, 304 U. S. 458, following the rule announced in *Frank v. Mangum*, 237 U. S. 309; *Powell v. Alabama*, 287 U. S. 45; *Glasser v. United States*, 315 U. S. 60.

The remedy by habeas corpus is designed to avoid the effects of a void judgment of conviction. It neither modifies nor revises the judgment of conviction. Its purpose is not to set aside the judgment but to release the prisoner from detention, leaving the judgment undisturbed. It does not perform the office of a writ of error or appeal. *McNally v. Hill*, 293 U. S. 131; *Harlan v. McGourin*, 218 U. S. 442. Obviously, a Court sitting in habeas corpus in California cannot correct, modify or alter the void judgment of conviction and the void sentence entered in Michigan. It has no jurisdiction over the trial proceeding whatever. It cannot restore to that Court the jurisdiction it lost.

A Court sitting in habeas corpus is empowered only to remand the petitioner to the custody of respondent or to discharge him from custody. *Dorsey v. Gill*, 148 F. (2d) 857. It is said in *McNally v. Hill*, 293 U. S. 131:

"The purpose of the proceeding defined by the statute was to inquire into the legality of the detention, and the only judicial relief authorized was the *discharge* of the prisoner, or his admission to bail, and that only if his detention were found to be unlawful."

Where a *sentence* is defective a Court sitting in habeas corpus is not authorized to return a petitioner to another jurisdiction for further proceedings upon an indictment. It does not function as an extraditing agency. Inasmuch as a defective sentence is a non-jurisdictional curable defect the Court in habeas corpus may authorize a delay in the discharge date while it notifies the committing authorities of the time and place it intends to release a prisoner so that those authorities may make provision for his arrest or institute extradition proceedings against him.

However, where the *judgment of conviction* itself is void the defect is jurisdictional and incurable. In such a case a Court sitting in habeas corpus is not empowered to return a prisoner to another jurisdiction for further proceedings upon an indictment and would seem to have no alternative except to discharge the prisoner from custody. See *In re Bonner*, 151 U. S. 142; *In re Medley*, 134 U. S. 160; *Ex parte Nielsen*, 131 U. S. 176.

In the instant case the *judgment of conviction* was void because of the deprivation of the assistance of counsel. Inasmuch as eight (8) years has elapsed since the entry of the void conviction and the petitioner has been imprisoned for that period of time, further

proceedings upon the indictment are barred by the speedy trial guaranty of the Sixth Amendment and the due process clause of the Fifth Amendment.

Compare:

In re Alpine, 203 Cal. 731, 265 Pac. 947;

Harris v. Municipal Court, 209 Cal. 55, 285
Pac. 699;

and

In re Gergerow, 133 Cal. 349.

CONCLUSION.

Wherefore, petitioner prays that certiorari be granted to the end that this cause may be reviewed, that the order of the Circuit Court be vacated; that the minute order of the District Court be amended to "order the discharge of petitioner"; and that the minute order of the District Court be affirmed as amended.

Dated, Alcatraz, California,
October 14, 1946.

Respectfully submitted,

WALTER McDONALD,

Petitioner, Pro Se.



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CITATIONS

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Section 2 (a) and (b) of the Bank Robbery Act of May 18,
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(a) and (b)..... 2

(1)

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 637

WALTER McDONALD, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES
PENITENTIARY, ALCATRAZ, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the district court (R. 73-78) are reported at 62 F. Supp. 830. The opinion of the circuit court of appeals (R. 144-148) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 30, 1946 (R. 148-149). The petition for a writ of certiorari was filed October 23, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The only question presented by the decision of the District Court on habeas corpus is whether petitioner's constitutional right to have the effective assistance of counsel for his defense was sufficiently protected by the trial judge under the circumstances of this case.

STATEMENT

On January 25, 1939, petitioner and Otto Barowski were convicted in the District Court for the Eastern District of Michigan after a trial by jury under a six-count indictment charging them with robbing the Farmington State Bank, a member bank of the Federal Reserve System and the deposits of which were insured by the Federal Deposit Insurance Corporation, and with putting in jeopardy the lives of several employees and officers of the bank, in violation of Section 2 (a) and (b) of the Bank Robbery Act of May 18, 1934, c. 304, 48 Stat. 783, as amended, 12 U. S. C. 588b (a) and (b) (R. 99-105, 106-107).¹ Each was sentenced generally to imprisonment for 35 years (R. 107-108, 111), subsequently reduced to 25 years.²

¹ Count 1 charged the robbery of the bank in violation of section 2 (a); the remaining counts each charged that in committing the robbery the life of a different named person was put in jeopardy by the use of dangerous weapons in violation of section 2 (b).

² Robbery of a bank in violation of section 2 (a) may be punished by imprisonment for not more than 20 years; a vio-

The present proceeding arose upon a petition for a writ of habeas corpus filed by petitioner in the District Court for the Northern District of California on June 13, 1945, in which petitioner sought his release from the custody of the respondent warden on the ground that he had been forced to trial in the criminal proceeding with assigned counsel with whom he had had differences. He alleged that he had been without funds to employ counsel and that the trial judge would not appoint counsel for him; that he thought that Curran, the attorney who appeared for him at the trial, had been appointed by the judge; that he requested Curran to withdraw, which Curran refused to do; that Curran had had no opportunity to prepare his defense, and asked for a continuance for that purpose, which the trial judge denied; that he asked the judge for "other and unprejudiced counsel," explaining that Curran "was awaiting trial before the grievance committee of the Michigan State Bar * * * for professional misconduct; and that petitioner was

lution of section 2 (b) may be punished by imprisonment for not less than 5 years nor more than 25 years. On October 21, 1943, petitioner's sentence was reduced by the convicting court to 25 years, a reduction which was upheld on appeal. See 139 F. 2d 939 (C. C. A. 6), certiorari denied, 322 U. S. 730. The validity of this reduction of sentence was again presented in a habeas corpus proceeding in 1944 in the Northern District of California. This petition was denied and the denial was sustained on appeal. See R. 89-92, 120-129; 149 F. 2d 768.

the prosecuting witness"; and that the judge denied this request, "compelling petitioner to proceed to trial with his personal enemy simulating a defender and without having made any preparation whatsoever for a defense" (R. 2-6, 68). Petitioner in support of his allegations annexed the depositions of the trial judge, the prosecuting attorney, and Curran, which had been introduced in a habeas corpus proceeding in the District of Kansas instituted by petitioner and Barnowski in 1941, and, in addition a letter from the State Bar of Michigan showing that petitioner had filed a complaint against Curran on November 19, 1938, and that the complaint had been heard on March 10, 1939, and dismissed (R. 6-68), subsequent to petitioner's conviction.

The district court issued an order to show cause (R. 68), and the respondent filed a return in which he alleged the denial of petitioner's application for a writ of habeas corpus made in the same court in 1944 (R. 69-70). Petitioner filed a traverse alleging that the denial of the earlier application had no relevance to the instant proceeding (R. 70-71).³ The district court appointed counsel for petitioner (R. 72), and on September 20, 1945, handed down a "Memorandum and Order" denying the "motion to dismiss" and remanding petitioner to the custody of the United States Marshal

³ As has been indicated in footnote 2, *supra*, pp. 2-3, this proceeding related only to the question of the validity of the reduction of petitioner's sentence.

for the Northern District of California, "to be returned to the United States District Court for the Eastern District of Michigan, Southern Division, for further proceedings on the said indictment" (R. 73-78). In its memorandum the district court stated that "Undisputed facts show that at the trial, after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939 and dismissed" (R. 73); that "Here we have a layman charged with a serious crime who informs the court that he has had differences with his attorney. No inquiry is made by the court into the nature or seriousness of the differences, or whether or how these differences might affect the defense offered in behalf of the defendant. It seems clear that this case comes squarely within the holding in the Glasser case [*Glasser v. United States*, 315 U. S. 60, 71]. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of (McDonald [petitioner]) Glasser is disclosed by the record before us.'" The court concluded that applying

the ruling in the *Glasser* case to the facts presented, petitioner has been "denied his constitutional right to assistance of counsel" (R. 77).⁴

On appeal by the respondent warden, the Circuit Court of Appeals reversed the order of the district court. It held that the *Glasser* case had no application to the facts presented and that the district court should have denied the petition for a writ of habeas corpus because it appeared from the petition itself that petitioner was not entitled to the writ.

ARGUMENT

It is evident from an examination of the depositions of the trial judge, of Curran, petitioner's counsel, and of the prosecuting attorney, annexed to the petition for habeas corpus, that, as the district court stated in its memorandum opinion, the only undisputed facts were that petitioner, after the impaneling of the jury, stated to the trial

⁴The district court held that it was not foreclosed by earlier decisions of the Circuit Court of Appeals for the Tenth Circuit (113 F. 2d 984, certiorari denied, 311 U. S. 683; 129 F. 2d 196, certiorari denied, 317 U. S. 665) deciding petitioner did have the effective assistance of counsel; that the first case had been decided before the decision of this Court in *Glasser v. United States*, *supra*, and that while the second case was decided later, "there is no reference to it in the decision of the Circuit Court. It is probably that the attention of the Circuit Court was not called to the *Glasser* case or its decision would have been otherwise" (R. 74, 75-76).

The *Glasser* case was decided January 19, 1942. The first case in the Tenth Circuit was decided July 26, 1940; the second, June 17, 1942.

judge that he had had a disagreement with his attorney, Curran, that the trial judge did not inquire into the nature of the disagreement, and that there was then pending against Curran a complaint filed by petitioner with the State Bar of Michigan charging that Curran had been guilty of unprofessional conduct. Cf. the trial judge's deposition (R. 9) with those of Curran (R. 40), and the prosecuting attorney (R. 59). Hence, it is apparent that the only one of the differing versions of what had occurred which the district court accepted for the purposes of the petition was that contained in the deposition of the trial judge. That deposition states that Curran had not been assigned by the trial judge to represent petitioner, but had been retained by petitioner, and that although he was given opportunity to state the nature of his disagreement with Curran, petitioner failed to do so and did not request other counsel (R. 8-11). Indeed, the trial judge, in his deposition, stated that if petitioner had told "the real facts, * * * I would have excused the jury and made an investigation and if I had been satisfied that their difficulties were of such a nature that in my opinion the counsel could not proceed fairly, solely in the interest of the defense or defendants, I would have appointed other counsel, for them, had they shown their inability to procure counsel" (R. 12-13).

We think it is clear that there is no basis for the view of the district court that this case is con-

trolled by the decision of this Court in *Glasser v. United States*, 315 U. S. 60. In that case Glasser's retained attorney was assigned by the trial court also to represent Kretske, a co-defendant whose interests did not coincide with those of Glasser. The Court pointed out that "The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights." The Court concluded that this showed such a lack of solicitude on the part of the trial judge for the interests of Glasser as to result in the deprivation of his constitutional right to the effective assistance of counsel (p. 71).

The trial judge in this case has indicated that his failure to appoint new counsel was not the result of disrespect for the principle later embodied in the *Glasser* case. In the instant case, although given full opportunity, petitioner stated no facts to the trial court which would have led it to believe that there was such an irreconcilable difference between petitioner and his retained counsel as to make it improper for that counsel to continue in the case. Petitioner gave no indication then or at any time during the trial that he did not desire Curran to continue in the case because of his supposed grievance. It cannot, therefore, be said that the

trial judge in this case, as in the *Glasser* case, created a situation which might be said to have impaired petitioner's right to have effective representation. And there can be no doubt, as was indicated by the court below (R. 147), and as was held by the Circuit Court of Appeals for the Tenth Circuit in two prior habeas corpus proceedings instituted by petitioner (113 F. 2d 984 and 129 F. 2d 196), that petitioner's counsel did furnish him competent assistance at the trial.

CONCLUSION

The *Glasser* decision affords no justification for the action of the district court in granting petitioner relief by way of habeas corpus. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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